

Hector Rojas v. U.S. General Accounting Office

Docket No. 96-08

Date of Decision: March 6, 1998

Cite as: *Rojas v. GAO (concurring decision) (3/6/98)*

Before: Leroy D. Clark, Chair, for the Board *en banc*; Harriet Davidson, Vice Chair;
Michael Wolf, Member, concurring

Reduction-in-Force

Position classification

RIF procedures

Concurring Decision

Administrative Judge Michael Wolf, concurring:

I would reach the same result as my colleagues, although for different reasons. Specifically, I disagree with their conclusion that the Agency had an obligation to review the Petitioner's position description prior to conducting the RIF and that the failure to meet this obligation was alone a sufficient basis for overturning the RIF.

In Part I of the decision, the majority states that: "Employees in the recent APSS RIF had been afforded the measure of accuracy of a position review; principles of fairness dictate that Petitioner was entitled to comparable treatment." (Decision at 31, emphasis added). Part II of the decision revisits this issue: "We therefore conclude that prior to conducting a RIF, GAO must engage in a good faith review of position descriptions to ascertain that they are accurate." (Decision at 42-43). The import of these statements is that the Board has created a new legal right: employees now have the right to a position description review prior to a RIF. The majority has asserted the Board's jurisdiction to enforce that right and, as it does here, will reverse any RIF that is not preceded by a review of the affected position descriptions.

While I share my colleagues' sentiments that it is sound policy to undertake such review to ensure the accuracy of position descriptions, it is the leap from policy to legally cognizable rights that troubles me. I do not see any provision in law or regulation that gives this Board the authority to compel position description reviews; there is a similar lack of authority for this Board to reverse a RIF action solely because of the Agency's failure to undertake a review of position descriptions. The majority does not cite any legal support for the creation of this new right. In short, I believe that the majority decision expands this Board's jurisdiction beyond its permissible boundaries.

Notwithstanding this reservation, I reach the same result as the majority for reasons which are similar to theirs. The Agency has endeavored to RIF the Petitioner from a position that had been vacant for almost two years. The Agency admits that it reassigned the Petitioner from mining engineer work to a generalist evaluator position. Significantly, it did not "detail" him or place him in an "acting" position, since it knew that he would not be returning to his mining engineer position. The Agency intended his transfer in October 1994 to the Food/Agriculture issue area to be permanent.

The Agency's defense that this reassignment was only "informal," is unpersuasive. I agree with the majority that there is no such term or concept in the personnel lexicon. In effect, the Agency contends that it can refuse to process the paperwork necessary to formalize a reassignment and thereby preserve indefinitely its right to RIF the incumbent from a long-vacant position. Like the majority, I am troubled by the practical consequences of permitting such a tactic. Theoretically, the Agency's argument would permit it to assign the Petitioner to generalist evaluator work for ten years and still retain the authority to terminate his employment under the guise of a RIF from the mining engineer position. Such an argument is untenable.

Although the MSPB has held that RIF decisions should be based on an employee's position description of record, it has also held that an employee's position description is not necessarily the sole determinant of that employee's rights in a RIF. *Bateman v. Department of Navy*, 64 MSPR 464, 468 (1994); *Simonton v. Department of Army*, 62 MSPR 30, 36 (1994); *Salazar v. Department of Transportation*, 60 MSPR 633, 645 (1994); see *Drake v. Department of Commerce*, 18 MSPR 474, 478 (1983). Based on these decisions, I believe that this Board may look to all of the relevant evidence in determining the *bona fides* of a RIF and, indeed, whether a RIF took place. Therefore, while I believe that this Board does not have authority to review inaccurate position descriptions or to compel the Agency to undertake reviews of position descriptions, I believe that we can consider the failure to undertake a position description review as evidence in deciding whether a RIF took place and whether the Agency was motivated by factors appropriate to a RIF. When viewing all of the evidence together, I must conclude, along with the majority, that the Agency attempted to RIF the Petitioner from a long-vacant position and that it has no authority under prevailing RIF law to do so.